



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND ALABOUR REKLATIONS COURT

AT NAKURU

ELRC PETITION NO. 3 OF 2017

IN THE MATTER OF ARTICLES 10,19,20(1), 21(1), 22(1) AND 4(1) OF THE CONSTITUTION OF KENYA 2010.

BETWEEN

ISAACK MAI NA WAKAHU.....1ST PETITIONER
PAUL KARIUKI MUTUGI.....2ND PETITIONER
HARRISON KIMANI MACHARIA.....3RD PETITIONER
FLOMENA NJERI MWANGI (Suing as the legal representative of the estate of
ERUSTUS MBUGUA KAMAU (Deceased)).....4TH PETITIONER
MARY WANJIKU GITAU.....5TH PETITIONER
NANCY WAIRIMU MUNYOROKU.....6TH PETITIONER
ESTHER WAIRIMU GATHUKIA.....7TH PETITIONER
GRACE WANJIKU MURUMA.....8TH PETITIONER
MARTIN KABUE MAINA.....9TH PETITIONER
DAVID WAMUNYU KINYANJUL.....10TH PETITIONER
SIMON MUNGAI KIHUNGI.....11TH PETITIONER
PATRICK KARIUKI WANJOHL.....12TH PETITIONER
RAHAB WAIRIMU KARIUKI.....13TH PETITIONER
PETER RUNGURUA MURIUK.....14TH PETITIONER
ESTHER WANGUI NDERITU.....15TH PETITIONER
JAMES KIMATA WANGUL.....16TH PETITIONER
MARY WANJIRU NJUNGE alias
MARY WANJIRU GATHUO.....17TH PETITIONER
JACINTA WANJA KARANJA.....18TH PETITIONER

MILIAMU NYAMBURA MATHAI alias

MIRRIAM NYAMBURA MATHAI.....19TH PETITIONER

DICKSON KIPNGETICH TUIGONG.....20TH PETITIONER

SAMUEL RUKUNYA NJENGA.....21ST PETITIONER

JOYCE GATHONI NDICHO.....22ND PETITIONER

-VERSUS-

GEOTHERMAL DEVELOPMENT CO LTD.....RESPONDENT

JUDGMENT

1. The Petitioners mounted this Joint Petition dated 6th April, 2017 on the 11th April, 2017 through the firm of Leina Morintat and Company Advocates alleging unfair termination of the employment and for compensation for the alleged unfair termination.

2. The Petitioners aver that they were employed on various dated in the year 2010 however in April 2011 they were issued with short term contracts which were backdated. It is stated that save for the 1st Petitioner who was employed on 27th January, 2011 and 9th and 10th Petitioners who were employed by the Respondent on the 16th February, 2011 all the other Petitioners were employed on 31st January, 2011 on contractual basis working as labourer in various sectors such as stone pitching, control building, afforestation, spring pond fencing, stores fueling and masonry.

3. It is stated that the 2nd, 4th, 12, 14th and 15th Petitioners earned Kshs. 90 per hour while the rest of the Petitioners earned Kshs.42 per hour.

4. The Petitioners stated that they were all dismissed from employment verbally, without Notice or payment of their terminal dues.

5. The petitioners therefore prayed for judgment against the Respondent for:-

a) A declaration that the petitioner rights as enshrined in Articles 41(1) and 10(1) a, b as read with (2) a, c & c of the Constitution of Kenya were infringed by the Respondent

b) An award of compensation/damages do issue to each of the petitioners for violation of their fundamental rights and freedoms.

c) Costs of the suit.

d) Any other relief that this Honourable Court will deem fit to grant.

6. The Respondent entered Appearance on 24th August, 2017 and filed its' undated response on the 15th March, 2019 through the firm of Namasaka & Kariuki Advocates and stated that the provisions of the Constitution listed by the petitioners do not form the basis of their petition.

7. The Respondent stated that it engaged the 2nd, 5th, 8th, 9th, 12th, 13th, 14th, 15th and 19th Petitioners on casual basis who were given work depending on the availability of work at the Respondent and paid after the said work, however it denied ever engaging the rest of the Petitioner at all.

8. The Respondent also denied dismissing the petitioners as alleged and stated that the petitioners who were engaged with the respondent on casual basis were relieved from any engagement as soon as the assigned task was completed.

9. This Petition was disposed of by way of written submissions with the Petitioners filing on the 13th July, 2021 and the Respondent on the 26th July, 2021.

Petitioners' Submissions.

10. The petitioners submitted that the Respondent reduced the petitioner employment to short term contracts and reduced their salaries significantly contrary to labour practices as was held in **Kenya County Government Workers Union –v- Wajir County Government and another [2020] ekr.**

11. It was argued that the Respondent argument that some of the employees herein were not in their employment is without basis as all the short term contracts signed by the employee have been attached herein, which contracts have not been challenged by the Respondent in its response to the Petition.

12. It is the Petitioners submissions that when the contracts signed by the Petitioners and the Respondent expired the Respondent allowed the petitioner to continue working without signing new terms as such upon dismissal they ought to have been given notice of termination and paid their terminal dues. He argued that their dismissal was in violation of Article 10, 41 and 47 of the Constitution and urged this Court to allow the Petition as prayed.

Respondents Submissions.

13. The Respondent maintains that it engaged the 2nd, 5th, 8th, 9th, 12th, 13th, 14th, 15th and 19th Petitioners on casual basis and the contacts indicated that the employment was for 3 months and others 9 months which the Respondent under clause 6 was at liberty to terminate depending on performance of the task given. It was argued that the petitioners above agreed to the said terms and appended their signature to be bound by the said terms of the fixed contract therefore their employment ceased on the lapse of the said contract. In this it cited the case of **Margaret A. Ochieng –v- National Water conservation and Pipeline corporation [2014] eKLR** where Justice Rika with regard to fixed term contract held that; -

“...Courts have upheld the principle that fixed-term contracts carry no expectancy of renewal, in a catena of judicial authorities. This Court has done so in Industrial Court Petition No. 35 of 2012 between George Onyango v. The Board of Directors Numerical Machining Complex Limited & Ors, [2014] e-KLR and in the Industrial Court Cause No. 1541 of 2010 between Bernard Wanjohi Muriuki v. Kirinyaga Water and Sanitation Company limited & Ors. The general principle is that fixed-term contracts carry no expectation of renewal.

37. Exceptions to this general principle are limited. The expiring contract may contain a clause giving expectancy of renewal as discussed by Hon. Justice Byram Ongaya in Industrial Court Case between Ruth Gathoni Ngotho- Kariuki v. the Presbytery Church of East Africa & Anor, [2012] e-KLR. In this case the Employer was obliged to give the Employee notice, 3 months before the expiry of her fixed-term contract, indicating whether her contract would be renewed or not. It was the Employer, unlike the present dispute, who would express the intention on the renewal. The Employer failed to do so, and the Court found that the Employee was justified in legitimately expecting there would be renewal. This Court similarly expressed the view in the case of Bernard Wanjohi Muriuki that an outgoing contract may impose the expectancy of renewal.

38. in the United Nations Appeals Tribunal [Tribunal D’ Appel Des Nations Unies] UNAT, Case No. 2010 -125 between Frenchon v. The Secretary- General of the United Nations, the Tribunal found that the decision of an Employer not to renew a fixed-term contract may be challenged on limited grounds. These include where the actions of the Employer give rise to legitimate expectation on the part of the Employee, that there would be renewal; and two, where the decision not to renew is based on improper motives or there are countervailing circumstances.”

14. The Respondent submitted further that the petitioners have failed to plead with precision the specific provision of the Constitution that have been violated by the Respondent. It is argued that the petitioners have merely listed the said provision. In this they cited the case of **Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another [2018] eKLR** where the Court held that;

“It is now an established principle of law that anyone who wishes the court to grant a relief for violation of a right or fundamental freedom, must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it. This was stated in the case of Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154 where the Court stated;

“ if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important(if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” (see also Meme v Republic & another [2004] 1 KLR 637)”

15. Accordingly, the Respondent submitted that the petition herein has no resemblance of a constitutional Petition and therefore the same ought to be dismissed on that basis.

16. The Respondent further submitted that the Petition is time barred having been filed more than 3 years after the alleged infringement, it was argued that the infringement occurred in the year 2011 and the Petitioner filed this claim in the year 2017 several years after therefore violating section 90 of the Employment Act.

17. The Respondent therefore urged this Court to dismiss the Petition herein with costs to the Respondent.

18. I have examined all the evidence and submissions of the parties herein. The issues for this court’s determination are as follows;

- 1. Whether the petitioner were employees of the respondent and if yes what was the nature of the contract of service.**
- 2. Whether the petitioners were unlawfully and unjustifiably terminated by the respondents.**
- 3. Whether the respondents breached the constitutional rights of the petitioners.**
- 4. Whether the petitioners are entitled to the remedies sought.**

Nature of employment contract

19. The petitioners averred that they were employed on various dates but were issued with short term contracts in April 2011 which were back dated.
20. The petitioners exhibited all the contracts issued to them some dated and some undated which stipulated that the petitioners were employed on temporary basis some for 3 months and others for 9 months earning 42/= per hour or 90/= per hour as the case may be.
21. The contract was clear that the petitioners were engaged on casual or temporary basis with no renewable clause.
22. The assertion by the respondents that they didn't employ all the petitioners except 2nd, 5th, 8th, 9th, 12th, 13th, 14th, 15th & 19th petitioners is therefore false.
23. I find that all the petitioners were engaged by the respondents on casual short term contracts of 3 or 9 months as the case was as per each contract.

Unfair termination

24. The petitioners also averred that they were unfairly terminated by the respondents.
25. They state they were terminated verbally. I do not however find the assertion by the petitioner plausible. The contracts exhibited by the petitioners show that the contracts were fixed term as indicated.
26. It implies that when the time lapsed, the contract ended by effluxion of time. It is also clear that these contracts carried no renewal clause and it is also the law that fixed term contracts carry no expectation of renewal.
27. It is therefore my finding that the petitioners have not established how their employment was unfairly terminated when they were serving on fixed term contracts which ended at the time specifically fixed.

Breach of constitution rights

28. Given that the petitioners have not established that they were unfairly or unjustly dismissed, it is also my finding that the constitutional rights were breached.

Remedies

- 1. I find that the petitioner had not established their case at all.**
- 2. I find the petition not merited and I dismiss it accordingly.**
- 3. There will be no order of costs.**

Dated and delivered virtually this 12TH day of **OCTOBER, 2021.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ayisi for Respondents – present

Morintat for Petitioners – absent

Court Assistant - Fred